HAZRIM (M) SDN BHD

v.

MALAYAN BANKING BHD

HIGH COURT SABAH & SARAWAK, TAWAU
LINTON ALBERT J
[SUIT NO: T(22)-37-2001]
7 DECEMBER 2005

CONTRACT: *Breach - Banking facilities - Refusing to release balance of facilities - Whether in breach of agreement - Non-fulfillment of conditions for release - Whether there was waiver - Counterclaim for amount already disbursed - Whether to be allowed*

By an agreement executed in March 2000 ('the facilities agreement'), the plaintiff obtained banking facilities amounting to RM400,000 from the defendant Bank. In April 2000, the plaintiff ordered substantial quantities of cooking oil from Felda Vegetable Oil Products Sdn Bhd ('Felda'). It was the plaintiff's case that Felda had made delivery of the cooking oil upon the defendant's confirmation of the facilities agreement hereof. Subsequently, in June 2000, the Bank, upon the plaintiff's insistence, released RM50,000 of the facilities to the plaintiff. The money was released notwithstanding that some conditions for its release had not been met by the plaintiff. However, the plaintiff had continued to fail to satisfy the conditions for the disbursement and the Bank hence refused to release the balance of the facilities. The plaintiff alleged that the Bank had acted in breach of the facilities agreement, and had further disrupted its trade with Felda. The plaintiff hence filed the present suit to claim for its losses.

Before the learned judge, the plaintiff argued that the Bank had waived with the conditions of the facilities agreement and therefore had no valid reason not to release the banking facilities. The defendant contended that waiver did not apply to the facts herein, and in any case counter-claimed for the sum already disbursed to the plaintiff.

Held (disallowing claim and allowing counterclaim):

[1] The plaintiff's reliance on the doctrine of waiver is unsustainable. The plaintiff relied solely on the mere fact that partial release of the banking facilities was made on the basis of its submission of the draft Financial Statement for 1998 as required by the facilities agreement. However, apart from that, there was nothing to suggest that the plaintiff was led to believe

that the defendant would not insist on the plaintiff's compliance with the other terms of the facilities agreement before releasing the whole of the banking facilities. (p. 174 e)

[2] There was incontrovertible evidence that the plaintiff had never taken delivery of the cooking oil and nor was it released by Felda upon confirmation by the defendant of the facilities granted to the plaintiff. On a balance of probabilities, the plaintiff had not established that the defendant was in breach of the facilities agreement when refusing to release the balance of the facilities to the plaintiff. (p. 174 h)

[3] The certificate of indebtedness dated 8 April 2002 issued pursuant to cl. 10 of the facilities agreement showed that as at 31 August 2002 the plaintiff was indebted to the defendant in the sum of RM56,443.70. The plaintiff did not cross-examine DW1 on this certificate and so must be deemed to have admitted the same. Consequently, the defendant's counterclaim for the amount was allowed. (p. 175 d-f)

[Judgment entered for counterclaim].

Case(s) referred to:

Citibank NA v. Ooi Boon Leong & Ors [1980] 1 LNS 168 FC ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Plasticmoda Societa Per Azioni v. Davidsons (Manchester) Ltd [1952] 1 Lloyd's Rep 527 ***(refd)***

Plentitude Holdings Sdn Bhd v. Tan Sri Khoo Teck Puat [1992] 4 CLJ 1882; [1992]] 3 CLJ (Rep) 281 HC ***(refd)***

Tool Metal Manufacturing Company Ltd v. Tungsten Electric Company Ltd [1955] 2 All ER 657 ***(refd)***

WJ Allan & Company Ltd v. El Nasr Export & Import Company [1972] 2 All ER 127 ***(refd)***

For the plaintiff - Ridwandean Borhan; M/s Ansari & Co
For the defendant - Datuk Douglas C Primus; M/s Lee & Thong

Reported by Rose Aziz

JUDGMENT

Linton Albert J:

The plaintiff's cause of action was founded on an agreement contained in a letter of offer from the defendant for banking facilities to the plaintiff dated 15 March 2000 and accepted by the plaintiff on 23 March 2000. There was no controversy that that constituted a binding agreement between the plaintiff and the defendant. The salient features of the agreement were these:

TYPE	LIMIT
1. Overdraft(OD) - NPGS	RM100,000
2. Letter of Credit (sight) Trust Receipt/Bankers Acceptance (60 days) - NPGS	RM300,000

SECURITY
A11- Against joint and several guarantee by all director for RM400,000

DRAWDOWN
The facility is available for your use upon completion & finalisation of legal documentation.

Additional Terms And Conditions Approval:

1. Submission of 1998 duly certified audited Financial Statement within 1 month from Letter Offer date and 1999 Financial Statement within 6 months from Letter Offer date.

In June 2000, the defendant relented to the plaintiff's persistence in requesting for the release of the overdraft facility which was meant for the plaintiff's additional working capital, and made three separate disbursements totaling RM50,000 into different accounts operated by the plaintiff and its only two directors who were a husband and wife team comprising one Abdul Karim bin Ahmad (PW1) and one Hazizah @ Sutla bt Abd. Salam respectively. They were both undischarged bankrupts but this fact is not relevant although an oblique suggestion to the contrary was advanced by Learned Counsel for the defendant. The plaintiff had on 29 April 2000 ordered substantial quantities of cooking oil from Felda Vegetable Oil Products Sdn Bhd (Felda). It was alleged that Felda delivered the cooking oil to the plaintiff on the basis of the defendant's confirmation that the plaintiff had been granted banking facilities by the defendant and in breach of the agreement the defendant had failed and refused to pay Felda for the cooking oil which resulted in the plaintiff not being able to continue trading with Felda thereby incurring a loss of RM500,000 constituting the principal relief claimed by the plaintiff against the defendant in this action. It was not disputed that some of the conditions of the agreement for banking facilities had not been met by the plaintiff, notably the joint guarantee by the plaintiff's directors and submission of the plaintiff's certified audited Financial Statements for 1998 and 1999. The main thrust of the plaintiff's pleaded case was to the effect that the defendant had waived compliance with all these requirements because the defendant had released part of the banking facilities amounting to RM50,000 upon submission of the plaintiff's draft Financial Statement for 1998 to the defendant. The definitive statement of the law on waiver was authoritatively expressed in *WJ Allan & Company Ltd v. El Nasr Export & Import Company* [1972] 2 All ER 127 at p 140:

> The principle of waiver is simply this: if one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so: see *Plasticmoda Societa Per Azioni v. Davidsons (Manchester) Ltd* [1952] 1 Lloyd's Rep 527 at p. 539. There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter insist on them: see *Tool Metal Manufacturing Company Ltd v. Tungsten Electric Company Ltd* [1955] 2 All ER 657; [1955] 1 WLR 761. But there are cases where no withdrawal is possible, It may be too late to withdraw, or it cannot be done without injustice to the other party. In that event he is bound by his waiver. He will not be allowed to revert to his strict legal rights. He can only enforce them subject to the waiver he has made.

That passage in the judgment of Lord Denning was cited and reproduced with approval in *Plentitude Holdings Sdn Bhd v. Tan Sri Khoo Teck Puat* [1992] 4 CLJ 1882; [1992] 3 CLJ (Rep) 281. On the totality of the evidence before me, I do not think that the plaintiff's reliance on the doctrine of waiver is sustainable. The plaintiff relied solely on the mere fact that partial release of the banking facilities was made on the basis of its submission of the draft Financial Statement for 1998. Apart from that, there was nothing to suggest that the plaintiff was led to believe that the defendant would not insist on the plaintiff's compliance with the other terms of the agreement in order to effect release of the whole banking facilities. Clause 12 of the agreement stated:

> Waiver
>
> No delay in exercising nor any omission to exercise any right, power or remedy accruing to the bank upon any default shall affect impair or prejudice any right, power or remedy or be construed to be a waiver thereof or any acquiescence in such default, nor shall any action of the bank in respect or any default, affect impair or prejudice any right, power or remedy of the bank in respect of any subsequent default.

The plaintiff had ordered the cooking oil from Felda well before the RM50,000 was released by the defendant and, contrary to its pleaded case, there was incontrovertible evidence which established that the plaintiff had never taken delivery of the cooking oil nor was it released by Felda upon confirmation by the defendant of the banking facilities granted by the defendant to the plaintiff. These facts, coupled with the conduct of the defendant through whose

officers, in the person of all three witnesses called to testify on its behalf, which showed that the plaintiff had persistently sought compliance with the agreement in one form or another lead to the irresistible conclusion that the plaintiff's reliance on waiver was ill-founded. On a balance of probabilities, the plaintiff had, therefore, failed to establish that the defendant was in breach of the agreement in refusing to release the balance of the banking facilities to the plaintiff.

Turning now to the counterclaim, I find no difficulty in determining this in favour of the defendant. In the first place it was not disputed that the plaintiff had utilised RM50,000 disbursed by the defendant and this amount together with interest had not been repaid.

The defendant had, through its branch manager one Suryadi bin Abdul Samat (DW1) produced a certificate of Indebtedness dated 8 April 2002 (exh. D5) which established that as at 31 August 2001 the plaintiff was indebted to the defendant in the sum of RM56,443.70. The certificate of indebtedness was issued pursuant to cl. 10 of the agreement:

> Evidence Of Indebtedness
>
> In any legal action or proceedings relating to the facilities, a certificate of the bank as to any amount due to it under the facilities shall, in the absence of manifest error, be conclusive evidence that such amount is in fact due and payable.

DW1 was not cross-examined on the certificate of indebtedness nor was evidence to the contrary adduced and the plaintiff must therefore be deemed to have admitted that it was indebted to the defendant in the sum stated therein (see *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609) In any event on the authority of *Citibank N.A. v. Ooi Boon Leong & Ors* [1980] 1 LNS 168, a case cited by learned counsel for the defendant, the plaintiff's indebtedness to the defendant was conclusively ascertained by the certificate of indebtedness without the need for the defendant to provide proof of the debt.

In the circumstances, the plaintiff's action is dismissed with costs. The counterclaim is allowed with costs and I accordingly enter judgment for the defendant in the sum of RM56,443.70 with interest thereon at 8.8% per annum from 1 September 2001 until judgment and thereafter at 8% per annum until full payment.

Order accordingly.